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ALEXANDER L. STEVAS,
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No. 84-453

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

WALTER McCOVEY, JR., and LANCE R. WILKIE,
Respondents.

On Writ of Certiorari to the California Supreme Court

SUPPLEMENTAL BRIEF (RULE 22)

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SUPPLEMENTAL BRIEF (RULE 22)

After the petition for writ of certiorari was filed, respondent counsel wrote a letter to the petitioner, asserting that the petition improperly fails to mention that the local district attorney "conceded" at the trial level that the respondent has the right to fish in the Klamath River free of State regulation. The petition did not mention the matter because, as will be explained below, the matter was not mentioned in the decision under review and, in our view, is not material here in any event. Therefore, we do not believe that the matter is properly includible in the petition under Rule 21.1(g). Since respondent counsel's letter indicates that he believes otherwise, the People wish to bring the matter to the Court's attention to ensure that the petition fully presents this issue even though we do not believe it material.

At trial, the respondent moved to dismiss the criminal charges, which were based on California Penal Code sections 8685.6 and 182 and Fish and Game Code section 2002. The local district attorney opposed the dismissal motion, successfully, by arguing that the respondent lacks the right to sell fish *off* the reservation. In opposing the motion, the district attorney added a comment not material to his argument, thusly:

> "Counsel in their memorandum of points and authorities argue strenuously that the fish herein were caught on the Hoopa Valley Indian Reservation—and the People agree. *Mattz v. Arnett* (1973) 412 U.S. 481 clearly states that the Hoopa Valley Indian Reservation begins at the Pacific Ocean and continues along the Klamath River until the confluence of the Klamath and Trinity Rivers.
>
> "The defendants next argue that they have a federally protected right to fish by gill nets from the Klamath River and sell the same to sustain themselves. The People similarly agree that the defendants' right to fish in this manner in the reservation is controlled

federally and California law may not infringe thereon." CT 103:1-11.

The trial court, although dismissing the charges based on Penal Code section 182 and Fish and Game Code section 2002, denied the dismissal motion as based on Fish and Game Code section 8685.6, and the respondent was subsequently convicted for violating the latter provision. In its order denying dismissal, the trial court, relying on the district attorney statement, stated:

> "It is equally clear, however, that Yurok Indians have the right under federal law, to catch fish in this manner on their reservation, and the prosecution does not contend to the contrary. (*Mattz v. Arnett* (1973) 412 U.S. 481; *Arnett v. Five Gill Nets* (1975), 48 Cal.App.3d 454)." CT 142:13-17.

The district attorney made his gratuitous comment in the context of arguing, successfully, that the respondent cannot sell fish under the circumstances of this case. The district attorney obviously attached little significance to the question whether the respondent has the right to fish in the river, since this question was immaterial to his argument. Moreover, the district attorney's comment was incorrect as a matter of law, since he cited as authority this Court's decision in *Mattz v. Arnett,* 412 U.S. 481 (1973). In *Mattz,* this Court held only that an 1892 congressional act did not terminate the reservation, and the Court did not determine or even consider whether the reservation includes the river. Therefore, the district attorney comment was both immaterial to his successful argument and legally incorrect in any event.

Further, as the record before this Court fully discloses, the California Supreme Court decision under review, as well as the Court of Appeal decision preceding it, made no reference whatsoever to the district attorney's statement. Pet. App. 1-39. Thus, the statement was immaterial to the result and reasoning of the decision under review. Also, as

the petition indicates, the People fully raised before both the California Supreme Court and the Court of Appeal the question whether the respondent has the right to fish in the river. Pet. 6-7, & 7 n. 5.

Finally, and most importantly, both this Court and the California courts have consistently held that sovereign interests in navigable waters cannot be lost even by long-standing official conduct or interpretation that fails to recognize such interests. See *United States v. California,* 332 U.S. 19, 39-40 (1947); *California ex rel. State Lands Comm'n v. United States,* 457 U.S. 273, 276 n. 4 (1982); *County of Los Angeles v. Berk,* 26 Cal.3d 201, 222 (1980). *A fortiori,* California's sovereign interests in navigable waters cannot be lost by an unauthorized, out-of-context statement made by its representative in the trial proceeding.

For the above reasons, the People believe that the above-described facts are not material, and thus are not properly includible in the petition under Rule 21.1(g). Since respondent counsel's letter to us indicates a contrary view, we bring the matter to the Court's attention to ensure that the petition fully presents this issue.

Respectfully submitted,

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